IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel SCOTT EDWARDS,

Plaintiff/Appellee,

v.

Petition No. 34159

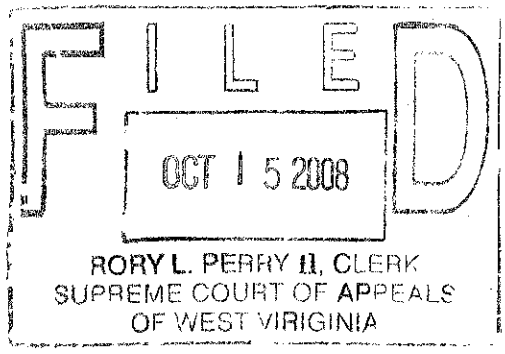
LINDA L. GIBSON, Recorder for the City of Hurricane, Putnam County, West Virginia; DONALD E. CHANEY; WILLIAM R. BILLUPS; C. BRIAN ELLIS; PATRICIA D. HAGER; and LANA M. CALL, Members of the City Council of the City of Hurricane, Putnam County, West Virginia,

Defendants/Appellees,

v.

SAM E. COLE,

Intervener/Appellant.



REPLY BRIEF ON BEHALF OF INTERVENER/APPELLANT, SAM E. COLE

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Comes now the Appellant, Sam E. Cole, by counsel, David O. Moye and Lisa M. Moye, and submits the following reply brief in further support of his Petition for Appeal:

Within the Response Brief filed in this matter by the Appellee, Scott Edwards, Mr. Edwards argues that (1) the filing of the Circuit Court election contest and service on the City of Hurricane by the Appellant was insufficient to meet the notice requirements of W.Va. Code § 3-7-6; and (2) that it was proper for Circuit Court Judge Eagloski to enter an Order which essentially nullified Circuit Court Judge Spaulding's prior Order and prevented the Judge Spaulding's Order from taking effect. To reply, the Appellant will address each of

these arguments individually.

I. Notice Requirement of W.Va. Code § 3-7-6

In regard to the first contention that the filing of the Circuit Court election contest and service on the City of Hurricane was insufficient to provide the Appellee, the Mayor of the City of Hurricane, with notice of the proceedings, the Appellant responds that such filing must have been sufficient because the Appellee sat in the front row at the hearing held before Judge Spaulding. It is inconsistent to state that the filing of a lawsuit against the City of Hurricane does not give notice to the newly elected Mayor of the City of Hurricane especially when the newly elected Mayor appears at the subject proceedings.

In this case, we have a situation where the City of Hurricane allowed individuals to cast votes without the use of secrecy envelopes and improperly included those votes in determining the successful candidate for Mayor. Now that this improper practice is challenged by the Appellant, the Mayor of the City of Hurricane argues that the West Virginia Code requires the Appellant to serve him personally with notice of the election contest. Thus, the Appellee, in effect, argues that it is irrelevant that a lawsuit was filed against the City of Hurricane and that he knew of the filing of the lawsuit. If we accept this scenerio as true, all successful candidates for an election could effectively avoid an election contest by leaving town and dodging personal service for ten (10) days after an election. Obviously, this is not what the legislature intended when drafting the language of W.Va. Code § 3-7-6.

Accordingly, a strict reading of the statute could result in an illegally conducted election being upheld only because the contestee purposely makes himself unavailable for service. In discussing the reading of statutes in elections contests, the Supreme Court has stated the following:

> "Statutes providing for election contests should be liberally construed, in order that the will of the people in the matter of choosing their public officers may not be defeated by merely technical objections." *Palumbo v. The County Court of Kanawha County*, 151 W.Va. 61, 150 S.E.2d 887 (1966) (quoting *Mullens v. Dunman*, 80 W.Va. 586, 92 S.E. 797 (1917)).

Therefore, the Appellant contends that a liberal construction of W.Va. Code § 3-7-6 leads to the obvious conclusion that the Appellee had constructive notice of the proceeding filed and held before Judge O.C. Spaulding and should not be permitted to argue that he did not have notice because he was not handed a copy of the Petition. The Appellee's technical objection is merely an attempt to prevent the Court from examining the ultimate merits of the Appellant's contest.

II. Consolidation of Cases & Res Judicata

The Appellee likewise contends that is was proper for Judge Eagloski to not consolidate the subject cases and enter an Order which prevented Judge Spaulding's Order from taking effect. The Appellee bases this argument on the fact that Judge Spaulding's Order stated that the matter was "dismissed and stricken from the active docket of the court" two (2) days before the Appellee filed his case which was assigned to Judge Eagloski. However, even if a case is dismissed by one Circuit Court Judge, another Circuit Court Judge in the same Circuit does not have the authority to enter an Order which then nullifies the first Judge's Order. We essentially have one Circuit Court Judge overruling the Order of another Circuit Court Judge in the same Circuit. Judge Spaulding's Order remanded the substantive issues of the case to the City of Hurricane for further hearing. Judge Eagloski's Order prohibits the City of Hurricane from conducting the subject hearing.

This is also where the doctrine of res judicata comes into play in this matter. In discussing this doctrine, the West Virginia Supreme Court of Appeals has held as follows:

> "Before the prosecution of a lawsuit may be barred on the basis of ***res judicata***, three elements must be satisfied. First, there must have been a

> final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

In this case, all three elements of the *res judicata* factors are present. Judge Spaulding entered an Order as a final adjudication remanding the case to the City of Hurricane for hearing and, as pointed out by the Appellee, dismissing the case from the Circuit Court's docket. The two (2) actions involve the same parties. The Appellant contends that it is wholly inappropriate for the Appellee to argue that he, in his capacity as the Mayor of the City of Hurricane, should not be considered as the same party as the City of Hurricane. Additionally, the cause of action identified for resolution in the second proceeding is identical to the cause of action determined in the prior civil action or is such that it could have been resolved in the prior case if the Appellee had chose to address the issue in the prior case. Instead, the Appellee chose to file a separate case in an attempt to re-litigate the issue and reach a different result which is exactly what happened in this matter. The Appellee was permitted to raise the same issue involving the same parties before Judge Eagloski to prevent the Judge Spaulding's Order from taking effect.

III. Conclusion

WHEREFORE, for the reasons set forth herein, the Appellant prays that this Court reverse and vacate the *Order* of the Circuit Court of Putnam County, West Virginia and grant him such other further and general relief as the Court deems appropriate.

SAM E. COLE
By Counsel

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CERTIFICATE OF SERVICE

I, Lisa M. Moye, co-counsel with David O. Moye,for Appellant, Sam E. Cole, hereby certify that service of the foregoing *Reply Brief on Behalf of Appellant, Sam E. Cole,* was made upon the following counsel on the 14th day of October, 2008, by mailing a true and exact copy thereof, postage prepaid, to the following addresses:

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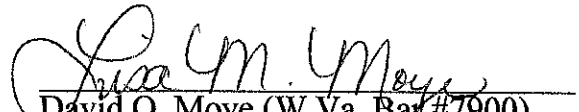

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